STATE OF MICHIGAN

COURT OF APPEALS

HING SOTHAR DUONG,

Plaintiff-Appellant,

v

JOSEPH PAUL FITTS a/k/a JAY JOSEPH COWELL, JR.,

Defendant-Appellee.

UNPUBLISHED
February 12, 2015

No. 323346
Allegan Circuit Court
Family Division
LC No. 10-046698-DP

Before: O'CONNELL, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Plaintiff mother, Hing Sothar Duong, appeals by right the August 6, 2014 order granting father Joseph Paul Fitts sole primary physical custody of the parties' minor child. We remand this case to the trial court for further proceedings.

On August 9, 2010, the trial court entered an order of filiation finding that Fitts was the minor child's father. The trial court awarded Duong and Fitts joint legal custody of the minor child. Duong was given physical custody of the minor child; Fitts was to have reasonable parenting time. On December 28, 2012, Fitts filed a motion with the trial court seeking full custody of the minor child. On August 6, 2014, the trial court entered an order amending the August 9, 2010 order of filiation. The trial court found that clear and convincing evidence showed that it was in the minor child's best interests to change the child's physical custodial environment from Duong to Fitts. The trial court ordered Duong and Fitts to share joint legal custody, Fitts to have sole primary physical custody, and Duong to receive parenting time.

On appeal, Duong argues that the trial court erred in regard to six of its findings concerning the 12 best-interest factors for child custody under MCL 722.23. Also, Duong argues that the trial court failed to address MCL 722.23(j). In regard to child custody, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. A trial court abuses its discretion regarding to whom to award custody, "when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

The Child Custody Act, MCL 722.21 *et seq*., "governs child custody disputes between parents, agencies, or third parties." *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). Child custody disputes must be resolved in the child's best interests, a determination made by the trial court after weighing the twelve best-interests factors outlined in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).

In this case, the trial court addressed all of the statutory best-interest factors except MCL 722.23(j). On appeal, Duong challenges six of the trial court's findings regarding the best-interest factors. We have reviewed Duong's arguments and find them to be without merit, except for the trial court's finding under MCL 722.23(k). In regard to that factor, the trial court merely found that "I don't recall any testimony about domestic violence." This finding was against the great weight of the evidence because both Duong and Fitts testified regarding domestic violence. As to the 10 other factors the trial court reviewed, it indicated that MCL 722.23(i) applied, but the court did not specify the minor child's preference. The trial court also found that three factors were equal, that three factors slightly favored Fitts; two factors favored Fitts, and one factor was not applicable. Therefore, were it not for the trial court's failure to make any findings regarding best-interest factor (j), we would rule that the trial court's conclusion regarding physical custody was not "so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias" as required for a finding that the trial court's conclusion was an abuse of discretion. *Berger*, 277 Mich App at 705.

The trial court, however, committed clear legal error when it failed to make any findings regarding best-interest factor (j). *Rivette v Rose-Molina*, 278 Mich App 327, 329-330; 750 NW2d 603 (2008). Where a trial court fails to state findings and conclusions regarding each best-interest factor, the proper remedy is remand to the trial court. *Id*.; *Parent v Parent*, 282 Mich App 152, 157; 762 NW2d 553 (2009). On remand, if the trial court determines that the existing record is sufficient to make proper evidentiary findings regarding factor (j), it may do so without a new custody hearing. *Rittershaus v Rittershaus*, 273 Mich App 462, 475-476; 730 NW2d 262 (2007). If the trial court determines that the existing record is insufficient, it shall conduct a new custody hearing. *Id*. at 476. If the trial court conducts a new hearing, it may consider up-to-date evidence. *Parent*, 282 Mich App at 157. Until the trial court issues a new custody order, the trial court's August 6, 2014 custody order shall remain in effect in the "interests of maintaining as stable an environment for the child as possible." *Id*.

Duong also argues that the trial court inappropriately relied on a report written by Dr. William Brooks on behalf of the Friend of the Court (FOC) because it was inadmissible hearsay. Duong's hearsay issue is unpreserved because it was not raised before the trial court. *Klapp v United Ins Group Agency (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Further, Duong provides no explanation or guidance as to how Brooks' report constituted inadmissible hearsay. This issue is abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). Regardless, the record demonstrates that Brooks submitted his June 4, 2014 supplemental report to the trial court pursuant to the directive in MCL 552.505(1)(g) that the FOC prepare a written report and recommendation if ordered to do so by the court. Therefore, the hearsay rules in MRE 801(c) and MRE 802 did not apply Brooks' report pursuant to MRE 1101(b)(9). *Dumm v Brodbeck*, 276 Mich App 460, 465; 740 NW2d 751 (2007).

Duong also argues that the trial court erred by relying on Brooks' custody recommendation in his supplemental report instead of the court's own evidentiary hearing when it made its change of custody ruling. Duong relies on the holdings in *Truitt v Truitt*, 172 Mich App 38, 42-43; 431 NW2d 454 (1988), that "[t]he trial court may consider a Friend of the Court's report, but must reach its own conclusions" and that "the circuit court's custody decision must be based upon its own evidentiary hearing, rather than the Friend of the Court's hearing and conclusions[.]" A review of the record indicates that the trial court did refer to and follow Brooks' recommendation when it reached its conclusion regarding child custody, but that the trial court also reached its own conclusion and relied on evidence from its own evidentiary hearing as required by *Truitt*. Duong's argument does not reveal clear legal error in the trial court's change of custody ruling. MCL 722.28.

We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Jane E. Markey